

THARRINGTON, SMITH & HARGROVE
ATTORNEYS AT LAW
RALEIGH, NORTH CAROLINA

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E. HARDY LEWIS
JAYE POWELL MEYER

RALEIGH OFFICE
209 FAYETTEVILLE STREET MALL
P.O. BOX 1181
RALEIGH, N.C. 27602

TELEPHONE
(919) 821-4711
TELECOPIER
(919) 829-1553

WASHINGTON OFFICE
2000 L STREET, N.W., SUITE 200
WASHINGTON, D.C. 20036

TELEPHONE
(202) 452-9271

January 19, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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JAN 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: The Cable Television Consumer
Protection and Competition Act of 1992
(Broadcast Signal Carriage Issues)
MM Docket No. 92-259

Dear Ms. Searcy:

Transmitted herewith for filing in the Commission's above-referenced proceeding are an original and six (6) copies of the Reply Comments of the Network Affiliated Stations Alliance.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

THARRINGTON, SMITH & HARGROVE

Wade H. Hargrove

WHH/ks
Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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JAN 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the Cable Consumer
Protection and Competition Act of 1992

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MM Docket No. 92-259

**REPLY COMMENTS OF THE
NETWORK AFFILIATED STATIONS ALLIANCE**

The Network Affiliated Stations Alliance ("NASA") is an informal alliance of the ABC, CBS and NBC Television Affiliate Associations whose membership consists of over 600 television broadcast stations that are affiliated with either the ABC, CBS or NBC broadcast networks.

NASA hereby submits these reply comments in the above-referenced proceeding.

**Implementation Of The
Exceptions To Retransmission Consent**

1. We support the proposal of the National Association of Broadcasters ("NAB")¹ for implementation of the exceptions to the retransmission consent requirement which appear in Section 325(b)(2) of the Act.² NASA is concerned, in particular, with the exception in Section 325(b)(2)(C) which exempts from the retransmission

¹See, NAB Comments, pp. 40-42.

²47 U.S.C. §325(b)(2). The Cable Consumer Protection and Competition Act of 1992 is referred to herein as the "Act" or the "Cable Act."

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consent requirement the retransmission of a station "owned or operated by, or affiliated with a broadcasting network directly to a home satellite antenna, if the household receiving the signal is an unserved household." This exception is grounded, as NAB notes, in the Satellite Home Viewer Act,³ and the definitions of "unserved household" and various other terms which appear in the proposed rules in Appendix A of NAB's Comments are based upon corresponding definitions contained in the Home Satellite Viewer Act.

2. Section 325(b)(2)(C) would exempt from the retransmission requirement the delivery of a broadcast network station's signal by satellite to home dish owners that do not receive an adequate over-the-air signal from a local station affiliated with the same network. NAB's proposed rules would permit the enforcement of this so-called "white area" exception, as does §501(e)⁴ of the Home Satellite Viewer Act, by both the station whose signal is being retransmitted and a station owned⁵ by or affiliated with a network within whose Grade B contour the signal of a duplicating network affiliate is being retransmitted. The proposed rule, therefore, would allow, as does the Home Satellite Viewer Act, enforcement by a local affiliate where the originating network

³17 U.S.C. §119.

⁴17 U.S.C. §501(e).

⁵To conform with the exact language of Section 325(b)(2)(C), NAB's proposed rule should read: "owned or operated by, or affiliated with" [Underlining supplied]

station is unlawfully being duplicated by direct service to a home satellite antenna.⁶ Section 501(e) of the Satellite Home Viewer Act treats the local network affiliate as a "legal or beneficial owner" of the rights conferred upon the affiliate through its network affiliation agreement.⁷ Because Congress intended Section 325(b)(2)(C) to be read and applied in concert with the Satellite Home Viewer Act, both the originating network station and the local network affiliate within whose local service area satellite delivery of a duplicating network signal is being retransmitted are entitled to enforce the exception. Congress extended this dual right of enforcement in the Home Satellite Viewer Act in recognition of the enormous expense and impracticality of monitoring the eligibility of thousands (soon possibly millions) of households scattered across the country that receive satellite service. In its Report accompanying the Home Satellite Viewer Act,

⁶We believe that NAB's proposed rule should be amended to allow a local network affiliate to enforce Section 325's exceptions only when the local affiliate is alleging a violation of Section 325(b)(2)(C). Accordingly, NAB's show cause enforcement rule on p. 3 of its Appendix A should, in our view, state as follows:

"Upon petition by a station whose signal is being retransmitted, or in the case of an alleged violation of §325(b)(2)(C) by a station owned or operated by or affiliated with a network within whose Grade B contour the signal of another station owned or operated by or affiliated with the same network is being retransmitted, the Commission may:"
[Underlining denotes the proposed change.]

⁷17 U.S.C. §501(e) states: "With respect to any secondary transmission that is made by a satellite carrier of a primary transmission embodying the performance or display of a work and is actionable as an act of infringement under section 119(a)(5), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station."

Congress called for a shared and cooperative effort by all parties to assure compliance and enforcement:

"The Act contemplates that network stations will cooperate with one another (and with the network with which they are affiliated) in monitoring the compliance of satellite carriers with the requirements of this Act, and that satellite carriers will similarly cooperate with networks and network stations in achieving compliance. In light of the expense and burden of monitoring the eligibility of thousands of individual households scattered across the nation, such cooperation will clearly be necessary to permit effective compliance."⁶

3. To the same extent it is impractical, if not impossible, for an originating network station to monitor compliance by satellite carriers with the Home Satellite Viewer Act, it is equally impractical, if not impossible, for an originating network station to monitor compliance with the Section 325(b)(2)(C) retransmission exception by satellite carriers serving dish owners on a nationwide basis. Accordingly, where properly authorized by the originating station, we urge the Commission, as NAB has proposed, to permit enforcement of the Section 325(b)(2)(C) exception by local stations affiliated with the same network.

Resolution Of Retransmission Consent Disputes

4. The Commission requested comment in Paragraph 57 of its Notice on whether disputes involving retransmission consent should be resolved by the Commis-

⁶H. Rept. 100-887, Part 1, Satellite Home Viewer Act (H.R. 2848), 100th Cong. 2nd Sess., August 18, 1988.

sion or by the courts. We agree with NAB's proposal that disputes concerning compliance with the Act's and the Commission's retransmission consent provisions should be enforced by the Commission while purely contractual disputes involving interpretation of a specific retransmission consent agreement should be resolved in local courts. It should be noted, however, that Section 325(3(A) expressly reposes in the Commission the responsibility to "administer" the exceptions contained in Section 325(b)(1) to the retransmission consent requirement. Thus, it is clear that Congress intended that disputes involving the exceptions to Section 325's retransmission consent requirement be resolved by the Commission.

**Applicability Of Must Carry
To Network-Owned Cable Systems**

5. In Footnote 49 of the Notice, the Commission observed that in connection with its recent action allowing broadcast networks to own cable systems it had established a procedure to allow local stations to file complaints to show competitive harm by a network-owned cable system with respect to station carriage and channel positioning. See, Report and Order in MM Docket No. 82-434, 7 FCC Rcd 6156 (1992), reconsideration pending. The Commission requested comment on the extent to which the 1992 Cable Act might affect those rules.

6. We urge the Commission not to modify or rescind its existing carriage rules for network-owned cable systems until the pending constitutional challenges to the Cable Act's must carry and channel positioning rules have been resolved. If the courts

should uphold the Cable Act's more comprehensive must carry rules, then no useful purpose would appear to be served by the carriage and channel positioning rules adopted for network-owned cable systems, and we believe that repeal of those rules would then be appropriate. It would be premature, however, to repeal the carriage and channel positioning rules for network-owned cable systems until the constitutionality of the Act's must carry and channel positioning rules is established. We, therefore, urge the Commission, for the moment, to leave those rules in place.

**Applicability Of Network Non-Duplication Rules
If Retransmission Consent Is Elected**

7. The National Cable Television Association ("NCTA") argues that the Commission's network non-duplication rules should not apply to a network affiliate that elects retransmission consent.⁹ Not only is NCTA's argument expressly at odds with the legislative history of the Cable Act, it is based on an apparent misunderstanding of the network non-duplication rules. NCTA states that the Commission's network non-duplication rules "automatically" afford an affiliate the right to require a cable system to delete a duplicating distant network station.¹⁰ That is not true. The network non-duplication rules afford non-duplication protection to an affiliate only if it is provided for by agreement between the network and the affiliate. The Note to Section 76.92 states:

⁹See, NCTA Comments, pp. 34-36.

¹⁰Id. at p. 35.

"With respect to network programming, the geographic zone within which the television station is entitled to enforce network non-duplication protection and priority shall be that geographic area agreed upon between the network and the television station." [Underlining supplied]

Thus, NCTA's argument is premised on an apparent misconception of the nature of the network non-duplication rules.

8. NCTA argues that the existence of the network non-duplication rules (and presumably, by analogy, the program exclusivity rules)¹¹ would somehow be unfair to local cable systems and to the viewing public in the absence of must carry. There is presently no must carry rule in place nor has there been in recent years, and the network and syndicated program exclusivity rules have in no way imposed a hardship on cable systems or the viewing public.

9. The effect of the Commission's non-duplication (and syndicated program exclusivity rules) is to constrict, rather than enlarge, the rights of television stations to contract for network non-duplication and program exclusivity protection. The rules, inter alia, limit the territorial scope of exclusivity, provide an exception for distant stations that are "significantly viewed" in the community, and contain specific procedures and notification requirements for implementation of the rules. NCTA's fairness argument is without merit and should, therefore, be rejected.

¹¹While NCTA does not challenge the applicability of the syndicated program exclusivity rules, the rules work the same way. The syndicated program exclusivity rule, like the network non-duplication rule, is triggered only by agreement of the parties. See, Sections 73.151 and 73.153.

10. More importantly, it is clear from the Cable Act's legislative history that Congress did not intend to confine the network non-duplication protection (or the syndicated program exclusivity) rules to stations electing must carry status. The Report of the Committee on Commerce, Science and Transportation expressly acknowledged the efficacy of these rules both in the case of a Section 614 or 615 must carry election and a Section 325 retransmission consent election. The Committee, at p. 38, stated as follows with respect to this issue:

"In that connection, the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12."¹²

Application Of Retransmission Consent To Distant Signals

11. PrimeTime 24 urges the Commission to limit the retransmission consent rights of network stations to "must carry situations" and argues that a failure to do so could somehow result in a loss of network service. It is clear beyond dispute that Section 325's retransmission consent provisions apply both to distant and must carry signals, and the Commission is without authority to construe Section 325 otherwise. Even if the Commission could restrict retransmission consent as PrimeTime 24

¹²S. Rept. 102-92, Cable Television Consumer Protection Act of 1991 (S. 12), 102nd Cong. 1st Sess., June 28, 1991.

proposes, no rational public policy argument could be made for restricting the retransmission consent rights of network stations and not independent stations. PrimeTime 24's argument is frivolous on its face.

January 19, 1993

Respectfully submitted,

NETWORK AFFILIATED STATIONS
ALLIANCE

By


Wade H. Hargrove

Counsel for the ABC Television
Affiliates Association

Tharrington, Smith & Hargrove
209 Fayetteville Street Mall
Post Office Box 1151
Raleigh, North Carolina 27602
(919) 821-4711

By

 (ES)
Werner K. Hartenberger

Counsel for the NBC Television
Affiliates Association

Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2630

By

 (ES)
Gregory M. Schmidt

Counsel for the CBS Television
Affiliates Association

Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

[c:\aaa.rep\ka]